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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 882

MARION H. ALLEN, Collector,

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

BRIEF ON BEHALF OF THE UNDERSIGNED STATES AS AMICI CURIAE

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 882

MARION H. ALLEN, Collector,

Petitioner,

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE.

To the Honorable the Supreme Court of the United States:

Now come the undersigned, Sovereign States of the United States, by their respective Attorneys General, and move this Honorable Court for permission to file a brief, amici curiae, in support of the position of the Respondent, the Regents of the University System of Georgia, contesting the validity of the Federal Excise Tax sought to be imposed by the Government upon admissions to inter-collegiate athletic contests charged by the University of Georgia and the Georgia School of Technology, agencies of the State of Georgia, in carrying into effect their educational programs and activities.

Your Amici consider it fundamental that the Federal Government cannot interfere with nor burden the States or their agencies in the exercise of their governmental powers and duties.

Your Amici urge the importance of the decision in this case, not only to the State of Georgia, but to almost every state in the union. Each of your Amici have interests which will be affected by the decision of the Court herein. There are no powers or duties of more importance than the mental and physical education of the youth of our nation.

WHEREFORE, the States of Minnesota, Michigan, Iowa, Kansas, Louisiana, Missouri, Nebraska, North Carolina, North Dakota, Wisconsin and Ohio pray that this Honorable Court will accept the following brief for consideration.

Dated: April, 1938.

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INTRODUCTION.

In this case the Regents of the University System of Georgia are contending that the imposition of the federal tax on admissions is an unconstitutional interference with the governmental functions of the State of Georgia in so far as it is sought to impose it upon admissions charged by the University of Georgia and the Georgia School of Technology to inter-collegiate athletic contests conducted at such schools under the authority of said Regents in carrying into effect the educational policies of the State of Georgia. Your amici are states operating universities and colleges that engage in the conduct of similar inter-collegiate athletic contests as an integral part of their educational programs and activities. The Commissioner of Internal Revenue has imposed the

same tax upon their activities of that character. Judicial and administrative proceedings are pending involving the taxes imposed upon some of your amici. Each of your amici is interested in a proper determination of the issue involved in the instant case because of its effect upon its own conduct of its educational functions.

SUMMARY OF ARGUMENT.

I. The United States may not hamper or interfere with the performance by a State or its instrumentalities of their governmental functions by imposing a direct burden upon their operations through the taxation of their performance of those functions.

II. Each of your amici owns and operates a university or college in carrying out its educational policies. Each of said universities or colleges includes a department of physical education as an integral part of the educational services rendered to the people of each of them through such university or college. Each of them engages in inter-collegiate athletic contests as an integral part of a system of physical education provided as an integral part of the educational program of the state, operated through such university or college. The conduct of such inter-collegiate athletic contests is, under those circumstances, a performance of a governmental function of the State owning and operating such university or college.

III. The imposition of the federal admissions tax on admissions to such inter-collegiate athletic contests imposes a direct burden upon the performance of the governmental function which each of your amici perform through the instrumentality of such university or college.

POINT I.

THE IMMUNITY OF STATE GOVERNMENTAL FUNCTIONS FROM FEDERAL TAXATION.

The general principle derived from the necessity of our dual system of government is that neither government may so exercise its taxing power as to directly burden or impair the effective functioning of the other within its allotted sphere. This principle was first announced in the historical case of McCulloch v. Maryland, 4 Wheat. 316, and it has never been deviated from since that time. This Court has frequently applied this principle to protect the Federal Government against the exertion of a State's taxing power and to protect a state government against the exertion of the Federal taxing power. The general test employed to determine whether the one government has exceeded its power and trenched upon those of the other, is that a tax by the one is invalid if its effect upon a governmental function of the other is immediate and direct, and valid only if its effect thereon is remote and indirect; Metcalf & Eddy v. Mitchell, 269 U. S. 514. This principle was specifically reaffirmed in the very recent case of Helvering v. Mountain Producers Corporation, 58 S. Ct. 623. The tests of directness and remoteness have varied from case to case, but have invariably taken account of the character of the activity on which the burden rests and of the desire not to extend the immunity to bring within its scope activities of the type traditionally associated with private enterprise. It is by reference to the tests evolved in previous decisions that the character of the burden in the new case must be determined. This matter will be considered in Point III of the Brief.

POINT II.

THE GOVERNMENTAL CHARACTER OF INTER-COLLEGIATE ATHLETIC CONTESTS.

The maintenance and operation of the universities and colleges by a state are the performance by such state of an essential governmental function. This is recognized by the provisions of an oft-quoted section of Article III of The Ordinance of 1787 that "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." It is immaterial whether they have a constitutional status as in some of the states such as Minnesota and some of the others, or are the creatures of statute as in Iowa and others. This court itself has recognized that to be the case. Brush v. Commissioner of Internal Revenue, 300 U. S. 352; 57 S. Ct. 495. It lies within each state to determine the extent and character of the branches of learning and the arts that it will promote through its institutions of higher learning. Physical education has long been considered a proper branch of training at the higher levels afforded by the universities and colleges. The incorporation of the inter-collegiate athletic contests as an integral part of the educational activities of physical education departments has become common practice in all of our institutions of higher learning whether maintained by the United States, the States, or by private endowment. This widespread practice constitutes irrefutable evidence that they constitute an appropriate activity for the proper execution of a general educational policy that aims to achieve the ideal of a sound mind in a sound body. The question therefore is whether modern physical education and athletic activities of that

character have been properly added to the old traditional educational programs of such institutions so as to entitle them to the same immunity from federal interference that belongs to those older traditional activities.

The proper solution of this problem requires a consideration of the position of inter-collegiate athletics. An excellent presentation hereof is found in a recent Note by Professor Ralph W. Aigler of the Law School of the University of Michigan, appearing in the February, 1938, issue of the Michigan Law Review, Volume 36, pages 627 to 641. Professor Aigler states in substance as follows: "To many people of the street football constitutes inter-collegiate athletics. Another common assumption is that the football activities in crowds of a rather small group of athletically prominent institutions are fairly representative of football in the hundred of universities and colleges whose doings are chronicled briefly, if at all, in the press. In truth, football at most institutions is only one of anywhere from five to fifteen inter-collegiate sports, all or nearly all of which, with perhaps the one exception, are probably conducted at a financial loss, so far as gate receipts are concerned." Even at those institutions with conspicuously large football income, "it is commonly true that the profit in that sport is insufficient to carry the deficits in their other athletic activities." In most, it is probably true that the educational programs, including inter-collegiate athletics, are required to be financed by funds derived from other sources than gate receipts. Among the sources from which the supplemental revenues are derived are state taxes in the case of state institutions. Such facts, as well as the known facts of the historical development of inter-collegiate athletics in the United States, negative any view that the universities and colleges have inaug-

urated and continued to carry on inter-collegiate athletics for the purpose of providing entertainment for the general public, or with an intention to invade the field of private business. The recent development of professional football shows that the private amusement business is rather tending to invade the field formerly reserved for the universities and colleges. The universities and colleges clearly cannot be shown to have taken up and developed inter-collegiate athletics for the purposes of making money by providing public entertainment. It is quite clear from the widespread progress of inter-collegiate athletics developed during the last fifty years, that the responsible public officials charged with administering the educational programs of the states have deemed such programs worthy of inclusion in their state's educational programs and so far as we are aware, no taxpayer has even seen fit to question that the use of public funds to provide facilities therefor has constituted an illegal waste or use of public funds.

The state courts have had occasion to consider the issue whether physical education and athletics were properly to be viewed as governmental functions when conducted by instrumentalities of the state. In an Oregon case, an action for personal injuries was based upon the negligence of a School District in placing a radiator in a gymnasium used in connection with the school. Under the Oregon legislation the District was not liable if it was engaged in a governmental activity and it was held that there was no liability in this case; Spencer v. School District No. 1, 121 Ore. 511, 254 Pac. 357. In a Minnesota case an action was brought against the School District for injuries suffered by plaintiff, a member of the football team of the school operated by defendant. The plaintiff was injured while playing

in a football game by unslaked lime placed on the gridiron by defendant. It was held that there was no liability because the defendant was engaged in a governmental activity; Mokovich v. Independent School District No. 22, 177 Minn. 446, 225 N. W. 292. In a Washington case it was held that a School District could use its power of eminent domain to acquire land for play-grounds which might be used for the common athletic games current among schools of its class; State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484. In a Michigan case it was decided that the University of Michigan could condemn land for a golf course; People v. Pommerening, 250 Mich. 391, 230 N. W. 194. In a Kentucky decision, German Gymnastic Assn. v. City of Louisville, 117 Ky. 958, 80 S. W. 201, exempting a gymnastic association from taxation as an educational institution, the court said:

> "Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to perfect education."

These decisions bear judicial witness to the soundness and propriety of the actions of the boards entrusted by the states with the promotion of their educational policies that physical education and inter-collegiate athletics as an integral part thereof are proper governmental functions of the states.

This Court, during its last term, discussed the question of what were governmental functions of one government immune from taxation by the other in two important cases. In the first of these, New York ex rel. Rogers v. Graves, 57 S. Ct. 269, 299 U. S. 401, it held invalid the imposition by New York of an income tax upon the salary received by the general counsel of the Panama Railroad Company, a New York Corporation, whose stock had been acquired and was then owned by the United States. In answer to objections that the corporation was engaged in activities which would have clearly constituted the conduct of ordinary private buisness, the Court took the position that this did not affect the governmental character of the railroad corporation because of its use in connection with the Panama Canal. It is a fair inference from this case that an activity which, considered alone, might be non-governmental, may be governmental when an integral part of a large enterprise that is admittedly of a governmental character.

Another case decided at the last term of this Court is that of Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495, in which the salary of the chief engineer of the New York City Bureau of Water Supply was held immune from federal income tax. It was there decided that the operation of such water supply system was the conduct of an essential governmental function of the state. It was stated that for a city such as New York the provision of an adequate water supply was a vital necessity and that there existed an important public interest in the conservation and distribution of water. The conclusion that the acquisition and distribution of a supply of water for the needs of a modern city involve the exercise of an essential governmental function was fortified by consideration of the pub-

c uses to which some of such water is put, such as sewers, treet sprinklers and supplying schools. This Court announced the principle that an activity which is a "necessary uxiliary" to the performance of admitted governmental unctions would itself share in and partake of the nature of hose functions and be itself governmental in character. his Court expressly rejected the view that a particular ctivity is non-governmental merely because it has been and ay be rendered by private enterprises, and the view that he fact that a charge is made for the services rendered by uch activity defeats its governmental character. In reference to the latter it stated:

> "The state or the city may exact a tuition charge for instruction in the public schools; but thereby the maintenance of the public schools does not cease to be a function of the government."

his case, therefore, supports the principle that a particular ctivity which is a reasonable and necessary auxiliary to the erformance of an admitted governmental function itself ecomes, by virtue of its relation thereto, a governmental unction. The activity of state universities on which the ax involved in the instant case is imposed is both a reasonble and necessary incident to their educational functions, nd a necessary auxiliary to the performance by them of heir educational functions, since no one would now deny he importance of physical training and education, and the raining of teachers in those branches, to be a proper part f a properly balanced educational system at collegiate evels.

The principles just discussed are supported by a consideration of the following case involving various aspects of tate educational activities in their relation to the federal

taxing power. In Hoskins v. Commissioner of Internal Revenue, 84 F. (2d) 627, the United States sought to tax the salary of the superintendent in charge of the operation of cafeterias in connection with a public school system. The theory of the United States was that the operation of those cafeterias was not a proper governmental function and that the superintendent's salary therefore was not immune from federal taxation. The court held it to be immune, and among other things stated:

> "We consider that the operation of the cafeteria system was a proper exercise of a governmental function by the school district and that Mrs. Hoskins is a public employee of a political subdivision of the State of Texas engaged in performing governmental functions."

The cases considered in this part show that the conduct of inter-collegiate athletics by the educational instrumentalities of a state have been held governmental activities in connection with various problems. The reasoning by which that position has been maintained requires a conclusion that they are governmental activities for purposes of defining the scope of the immunity of state activities from federal taxation. Reason confirms the soundness of the judgments of the state and federal courts that have passed on this matter and of the application of the same view to the problem involved in the instant case. It is highly erroneous to determine the issue on the assumption of divorcing inter-collegiate athletic contests from the educational program of which they are a part. So viewed, it is easy to argue that their function and purpose are those of public entertainment. The real issue, however, is whether such contests conducted by state universities and colleges as an integral part of a state's educational program are entitled to the

immunity shared by other state governmental activities. Viewed in their proper setting, the argument that their purpose is to provide the public with entertainment ceases to have even the merit of specious plausibility. Such a point of view would be as invalid as that rejected by this Court in Rogers v. Graves when counsel sought to deny the Panama Railroad Company its lawful claim to immunity merely because the operation of a railroad is a business enterprise. This Court in that case rightly insisted that the operation of a railroad as an integral part of the maintenance and operation of the Panama Canal was not such, however much it might have been such if not operated as an integral part of that large governmental activity.

POINT III.

THE TAX IMPOSES A DIRECT BURDEN UPON A STATE GOVERNMENTAL ACTIVITY.

The validity of the tax thus depends upon whether the burden that it imposes upon the conduct of a state's educational activity is direct or remote. The most important method for determining whether this tax imposes an immediate and direct burden upon such educational activities of a state, is to measure those effects by the tests of directness and immediacy that have been evolved by this Court in its long dealing with this subject matter. The tax in question is on either the entire transaction between a university and the purchaser, or on its act of selling the admission, or on the purchaser's act of purchasing the right to admission. It is immaterial on which particular one of these subjects the tax is imposed. The fact that the statute requires the tax to be paid by the purchaser of the ticket does not mean that

in law the effect on the university in the performance of its governmental function is not immediate and direct. A federal tax on the interest of a state bond is a tax paid by the recipient of the interest, but that has never prevented it from being held to be a direct and an immediate burden upon the state's power to borrow; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429. The tax imposed by the state of Mississippi which was held invalid by this Court in Panhandle Oil Co. v. Miss., 277 U. S. 218, was not imposed upon the United States as a purchaser of oil but was imposed upon and paid by the seller for the right to engage in the business of distributing oil and its products. In that case this Court stated:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests."

The same is equally true here where sale and purchase constitute the transaction on which the tax is based. The same principle was applied to protect the state against a federal tax on a vendor in Indian Motocycle Co. v. United States, 283 U. S. 570. In that case this Court stated:

> "The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle."

This principle of the unity of transactions is as applicable where the tax is imposed on the purchaser and required to be paid by him as it is where the tax is imposed upon and required to be paid by the vendor. This is clearly evidenced

by the case of U. S. v. King County, 281 Fed. 686. In that case a federal tax on transportation, which was required to be paid by the purchaser of the transportation, was held invalid under the principle involved in this case, because it imposed a direct burden upon the operation of a municipal ferry, a governmental function of King County, State of Washington. In that case the contention was specifically made that the fact that the tax was imposed on the purchaser prevented the operation of the principle protecting the states against federal taxation burdening their governmental functions. The Court answered the contention by saying:

> "It is true that in the present case the tax was not imposed directly upon the County of King, but upon the persons paying to it the transportation charges, but it is obvious that the collection of those charges is at least one of the means which the County must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the federal tax here involved is an interference with and a burden upon the governmental functions of the state."

These cases warrant but one conclusion, viz., that the decisive fact is not the particular subject on which the tax is imposed or who is required by law to pay the tax, but its effect upon the governmental activities of the other government. The force and effect of these decisions can scarcely be deemed to have been negatived by the provisions of Treasury Regulations 43, Article 24:

> "Admissions by or for the benefit of Federal, State, or municipal governments. * * * The fact that the authority charging admissions or receiving the proceeds thereof is the United States or an agency thereof, or a

> State or Territory or political subdivision thereof, such as a county, city, town, or other municipality, does not make such admissions exempt. The Act specifically provides that the taxes on admission shall be paid by the person paying for admission. It is not, therefore, a tax on the person or authority selling the admissions or receiving the proceeds thereof."

The decisions of this Court are clearly to be preferred to administrative regulations that find no support in the law.

The effect of the tax in the instant case is immediate and direct as measured by legal standards, since it is on the very act which constitutes the performance, by a state, through its university, of its educational functions. This is borne out by such cases as the following. In McCulloch v. Maryland, already cited, the state tax was on the activity of the bank in its performance of one of the functions for the performance of which it had been created by Congress. In the cases cited in the preceding paragraphs the essential feature that made the tax invalid was the fact that it was on the very act which was a part of the performance by the affected governments of a part of their governmental functions. In Ambrosini v. U. S., 187 U. S. 1, this Court clearly intimated that a federal stamp tax on a bond required to be furnished by a liquor licensee as part of the regulation of the saloon business was an unconstitutional interference with the state's power to grant such license, since it was on an essential element in the performance by the state of its police power, although the tax in this case had to be paid by the licensee. The force of this case has been in no manner affected by that of South Carolina v. U. S., 199 U. S. 437, sustaining a federal license tax on a state's operation of a dispensary for the sale of intoxicants, since the issue therein was not whether the effect of the tax was direct or indirect

but whether the activity taxed was governmental or non-governmental. Measured by the legal standard developed by this Court, the effect of the tax involved in the instant case is clearly direct in its incidence upon the conduct by a state of its educational functions.

The effect of the tax in the instant case is also immediate and direct since it is on the formation of a contract incident to the performance by the state, through its university, of its educational functions. In Western Union Telegraph Co. v. Texas, 105 U. S. 460, a state tax upon each telegram sent from offices within the state was held invalid as applied to messages sent by the United States as imposing a tax on the means employed by the United States to carry out its constitutional powers although here, too, the tax was imposed upon the vendor and not upon the United States. A similar principle was applied in Williams v. City of Talladega, 226 U. S. 404. In Panhandle Oil Co. v. Miss. and Indian Motocycle Co. v. U. S., and U. S. v. King County, all heretofore cited, the tax was upon the formation of a contract entered into by the one government in the performance of its governmental functions, and the other contracting party was in each case a private person. There are no cases of which we are aware in which this Court has not found that the effect of a tax was immediate and direct when the tax was imposed upon a transaction to which the other government was a party, whether the transaction were the formation of a contract or a sale. The contract itself is one of those instrumentalities of such government with respect to which this Court said in Metcalf & Eddy v. Mitchell, supra, that "this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the

other." That case lists among such agencies or instrumentalities state officers, state bonds and the income therefrom. Those agencies are all said to be "so intimately connected with the necessary functions of government as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it." The tax in question in the instant case is in substance a tax imposed by the federal government upon the use by the state of the instrumentalities owned by it for the performance of its governmental functions of education.

This Court has at times measured the directness and immediacy of the effect of a tax, imposed by the one government on the activities of the other, by the factor whether the amount of the tax varied directly with the extent of the activities taxed. This factor was especially stressed in the case of Panhandle Oil Co. v. Miss., 270 U. S. 218, in which this Court stated on this matter:

> "The validity of the taxes claimed is to be determined by the practical effect or enforcement in respect of sales to the government. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede, and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. To use the number of gallons sold the United States as a measure of the privilege tax is in

> substance and legal effect to tax the sale. And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State."

It was, therefore, held that the tax on the privilege of distributing gasoline measured by the number of gallons sold imposed a prohibited burden on the United States so far as the measure included gasoline sold to it for governmental purposes. It follows that if a tax is invalid under the principles now being considered when its measure merely is of such character that the amount of tax varies directly with the extent of the activity which it burdens, a fortiori, is a direct burden imposed when the tax is on the activity itself, and is of such character that the greater the amount of the activity the greater the contribution demanded of the state for the support of the federal government. Measured by this test the tax involved in this case does impose a direct and immediate burden upon a governmental function of the States.

The admissions tax involved in this case is a tax on the act of students, faculty, alumni and other persons in obtaining a license admitting them to the athletic contests conducted by a university as a part of a state's educational activity, and is a tax upon the university's grant of that license. The state's act of granting admissions to its property is the instrumentality through which it exercises, through its university, its governmental function of education. The tax in question is in substance a tax on the exercise of that power. The state does not derive its power to act through that instrumentality, and to enter into these transactions with a private citizen, from the United States. In Panhandle Oil Company v. Miss., already cited and discussed herein, this Court stressed the fact that the right of

the United States to purchase gasoline for the operation of its instrumentalities was not derived from the state nor dependent upon the state laws, but resulted from the authority of the national government to choose its own means and source of supply. The state has the same freedom to choose its own means for carrying out what it conceives to be, and has decided to be, the kind of educational policy that it wishes to promote. It does not derive that right from the United States but it is inherent in its existence as a state in this federal union. The tax in question is in substance an attempt by the United States to determine the proper scope of the state's educational policy. This is beyond its power. It could not do so directly nor may it do so by indirection through pressure resulting from taxing the state's activities in this field. It is not a situation in which the federal government can use an admitted power to curtail a state's act that conflicts with the exercise of such power as was true of the tax imposed on the circulation of state organized banks.

The tax in question is also one on the power of a university, a state agency, to receive income for granting others a license to temporarily use its property. It has been held that the United States cannot tax the dividends received by a municipality on stock acquired by it as part of a plan for subsidizing a railroad. The acquisition and holding of such stock was held to be the exercise of a governmental function from which the immunity of the income received thereon from federal taxation was deduced. U. S. v. B. & O. R. Co., 17 Wall. 322. This Court has also stated, in deciding that a state cannot tax federal bonds, that "the right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible

influence on the contract." Weston v. Charleston, 2 Peters 449. In a substantial sense the admission tax is a tax on a contract of a university, when made, and operates upon its power to make such contracts before that is exercised and has a decided influence thereon. The tax is therefore within the condemnation of the principle stated in the case last cited.

There is nothing in the latest decisions of this court in any way denying the test of directness developed in the cases herein relied upon. In the case of James v. Dravo Contracting Company, 58 S. Ct. 208 this Court merely applied the principles of Metcalf & Eddy v. Mitchell, supra, to a new type of tax. The Dravo Contracting Company was held to be an independent contractor, a purely private enterprise. The admissions tax, even though in terms payable by the purchaser, is a tax on the activity of a state instrumentality and thus of the state itself, whereas the tax involved in the Dravo Contracting Company case was upon the emoluments received by a private enterprise from a contract with the federal government. The case contains no intimation that the state would have been permitted to tax the making of the contract between the United States and the Dravo Contracting Company. The most recent case is that of Helvering v. Mountain Producers Corporation, already cited, in which this Court sustained a federal income tax upon the net income of a private corporation exploiting the oil resources of state school lands under a lease derived from the state. Here, too, the immediate incidence of the tax was upon the private enterprise with respect to the profits from the conduct of a private business. In such case the effect upon the state's activity can occur only so far as the tax can be shifted backward to the state as lessor. The complexities

involved in the shifting of taxes is such that there was a high probability that the private lessee might absorb the tax or shift it in part to the consumer. In any case the tax was not on the state's activity in executing the lease under which the private lessee derived his net income. This Court, while overruling the Gillespie and Coronado cases, stated with respect to those two cases as follows:

> "In the light of the expanding needs of state and nation, the inquiry has been pressed whether this conclusion (that the taxes in the Gillespie and Coronado cases hampered the government in executing their policies) has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest but is imposed upon the gains of the lessee, like that made upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income."

It was held that the taxation of the lessee's income did not directly hamper the efforts of the lessor government in carrying on its policy in making leases. There is, however, no single intimation that this Court intended to overrule the cases in which it has held invalid the taxation by the one government of the contract or the making of the contract of the other. That is the issue presented by the admissions tax as applied to the inter-collegiate athletic contests conducted by state owned and operated universities and colleges. There is, therefore, no basis for affirming that the Mountain Producers Corporation case requires any conclusion other than that the conduct of such inter-collegiate contests is immune from taxation by the United States.

CONCLUSION.

It follows from the argument set forth in the preceding pages that state universities and colleges, in conducting inter-collegiate athletic contests as an integral part of the system of physical education as part of a general educational program, are engaged in the performance of a governmental activity of the state. The federal tax on admissions to such contests is a tax on the contract and the making of the contract between a state instrumentality and those with whom it contracts. The burden of such tax on a state's activities consisting of the making of such contracts and the conduct of such contests is a direct and immediate burden by all of the tests heretofore developed by this Court for the determination of such issue. It is, therefore, a tax that imposes a direct burden on the performance by the states of an important part of their governmental functions. It is, therefore, invalid and in violation of the immunity that such state activities and functions possess from such burdens.

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APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 500

(b) No tax shall be levied under this title in respect of—

(1) Any admissions all the proceeds of which inure (A) exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, societies for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any city, town, village, or other municipality, or of maintaining a cooperative or community center moving-picture theater—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual; * * * (U. S. C., Title 26, Secs. 940-944.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 711. Admissions Tax.

(a) Paragraph (1) of section 500 (a) of the Revenue act of 1926, as amended, is amended to read as follows:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in case the amount paid for admission is less than 41 cents, no tax shall be imposed. In the case of persons (except bona fide employees, municipal officers on official business, and children under 12 years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, an equivalent tax

shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted. Amounts paid for admission by season ticket or subscription shall be exempt only if the amount which would be charged to the holder or subscribed for a single admission is less than 41 cents;"

* * * * *

(c) Section 500 of the Revenue Act of 1926, as amended, is amended by adding at the end thereof the following subdivision:

"(e) The exemption from tax provided by subdivision (b) (1) (A) shall not be allowed in the case of admissions to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions. The exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States.)"